APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-12140 Non-Argument Calendar

[Filed October 19, 2006]

TABITHA A. JONES,	)
ALLISON JONES, JR., et al.,	)
Plaintiffs-Appellants,	)
	)
v.	)
	)
CITY OF ATLANTA,	)
MARILYN T. STONE,	)
OFFICER CHARLES E. FRYE,	)
Defendants-Appellees.	)
	)

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 04-01928-CV-CC-1

Before TJOFLAT, MARCUS and COX, Circuit Judges

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the

Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-12140 Non-Argument Calendar

[Filed August 9, 2006]

TABITHA A. JONES,	)
ALLISON JONES, JR., et al.,	)
Plaintiffs-Appellants,	)
	)
v.	)
	)
CITY OF ATLANTA,	)
MARILYN T. STONE,	)
OFFICER CHARLES E. FRYE,	)
Defendants-Appellees.	)
	)

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 04-01928-CV-CC-1

Before TJOFLAT, MARCUS and COX, Circuit Judges

PER CURIAM:

The Estate of Allison Jones, Tabitha Jones, and Allison Jones's five children (collectively, "the Joneses") sued the

City of Atlanta and City of Atlanta police officers Marilyn T. Stone and Charles E. Frye, in their official and individual capacities. The Joneses assert claims pursuant to 42 U.S.C. § 1983 for use of excessive force in violation of Jones's federal constitutional rights and for state torts arising out of the same use of force. The district court granted all Defendants summary judgment on the federal claims and declined to exercise jurisdiction over the pendent state law claims. As to the § 1983 claim against the officers in their individual capacities, we reverse. As to the § 1983 claims against the City of Atlanta and the officers in their official capacities, we affirm. We vacate the dismissal of the state law claims to enable the district court to reconsider the question of whether to exercise jurisdiction over the state law claims.

I. FACTUAL & PROCEDURAL HISTORY

The undisputed facts are these. On July 2, 2002, at approximately 10:45 a.m., Officers Stone and Frye were returning from their lunch break. They were in their police vehicle, stopped at a red light at Harrison Road and Virginia Avenue. They were outside the City of Atlanta police jurisdiction but had radioed that they were returning to service.

Officers Stone and Frye observed a white Lincoln Navigator traveling at a high rate of speed, eastbound in the westbound lane of Virginia Avenue, passing the officers' vehicle, running the red light, and attempting to turn right to enter I-85. However, because the Navigator was traveling at such a high rate of speed, it was unable to make the turn onto the I-85 entrance ramp and instead crossed over the traffic island, crashed into the guard rail, and came to a stop. Officers Stone and Frye, knowing that they were outside of their own police jurisdiction, proceeded to the scene of the

accident and radioed Communications asking for another police jurisdiction. When they arrived at the accident scene, Officer Stone parked the police vehicle behind the Navigator. The officers then exited the police vehicle and approached the Navigator, which had been driven by Allison Jones. Officer Frye drew his weapon. The officers ordered Jones to exit the vehicle. Jones did not exit the vehicle, and the officers fired their weapons into the vehicle. Two of the shots hit Jones; one was fatal.

The facts of the interaction between the officers and Jones are disputed. The officers maintain that Jones acknowledged the officers' commands to exit his vehicle but refused to do so. The officers and some eye witnesses say that Jones attempted to run over the officers with the Navigator, first by backing over them then (after turning the vehicle) by hitting them with the front of the vehicle. And, the officers contend that they fired in self defense, attempting to stop Jones [*4] from using the moving vehicle to cause them great bodily harm. The Plaintiffs contend that the officers were not in danger of bodily harm and that Jones moved the vehicle to escape the officers' gunfire, contentions that are supported by several eye witnesses' statements that the officers shot into the vehicle before Jones moved it from the accident site.

The Joneses sued Officers Stone and Frye, in both their individual and official capacities, and the City of Atlanta for violation of Jones's federal constitutional rights and torts arising under state law. The district court granted all the Defendants summary judgment on the federal claims, holding that: (1) no constitutional violation had occurred because the officers acted reasonably in self defense; (2) the suit against the officers in their individual capacities is barred by qualified immunity; and (3) the City of Atlanta was not liable for the officers' conduct. The Joneses appeal.

II. ISSUES ON APPEAL & CONTENTIONS OF THE PARTIES

The Joneses argue that the district court erred by finding that there was no disputed material issue of fact regarding the reasonableness of the officers' actions in firing on the Navigator. In support of this argument, they cite statements of several witnesses who say they saw the officers fire into the vehicle before the vehicle moved in the officers' direction. The Joneses also argue that, because the incident occurred outside of the City of Atlanta police jurisdiction, the officers are not entitled to qualified immunity. Finally, they contend that the City of Atlanta is liable for the actions of the officers because it condoned their actions.

Defendants argue that the district court did not err in granting summary judgment because, as a matter of law, the officers acted reasonably when they shot into the vehicle in self defense. Therefore, they reason, the officers did not violate Jones's constitutional rights, and neither the officers nor the City of Atlanta can be liable to the Joneses. The individual Defendants also argue that, even if the officers violated Jones's constitutional rights, they are immune from suit in their individual capacities pursuant to the doctrine of qualified immunity.

III. STANDARD OF REVIEW

We review de novo a grant of summary judgment, construing all facts and making all reasonable inferences in the light most favorable to the non-moving [*6] party. *See Kesinger ex rel. Estate of Kesinger v. Herrington*, 381 F.3d 1243, 1247 (11th Cir. 2004) (citing *Cottrell v. Caldwell*, 85 F.3d 1480, 1486 (11th Cir. 1996)).

IV. DISCUSSION

A. Constitutional Violation

Before deciding whether Officers Frye and Stone are entitled to qualified immunity for their alleged violation of Jones's constitutional rights, we must determine whether there is an issue of fact as to whether any such violation occurred. In other words, we ask, "'[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?'" *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002) (quoting *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272 (2001)). Only if a constitutional right would have been violated under the plaintiff's version of the facts, must a court proceed with the qualified immunity analysis. *Id.*

Officers Frye and Stone maintain that they shot Jones in self defense. They say, and some eye witnesses agree, that Jones used his vehicle as a deadly weapon when he drove it directly at the officers, with the intention of hitting them. Officers Frye and Stone maintain that they did not fire on Jones's vehicle until he tried to run over them. A reasonable jury could believe them. But, the court's obligation at this stage of the proceedings is to view all of the evidence in the light most favorable to the Plaintiffs. The complaint alleges that Officers Frye and Stone shot Jones without any provocation. (R.1-1 ¶¶ 12-14.) And, at least some witnesses support the Plaintiffs' allegations. Witnesses Hayat, Penn, T. Jacobs, and E. Jacobs gave statements to police that they had observed Officers Stone and Frye firing their weapons at Jones's vehicle before the vehicle moved from the initial accident site. *See* R.1-24 at 20-1-3 through 20-3-3 (Hayat); *id.* at 10-1-1 & 37-5-34 (Penn); *id.* at 37-6-34 through 37-7-

34 (T. Jacobs); *id.* at 16-1-1 (E. Jacobs). A reasonable jury could also believe them.

Firing on a stationary vehicle containing an accident victim who was neither threatening the officers with harm nor a suspect in a crime (other than possible misdemeanor traffic violations) is an excessive use of force and a violation of a victim's right to be free from unreasonable seizure. *See Vaughan v. Cox*, 343 F.3d 1323, 1329 (11th Cir. 2003) (finding that shooting into vehicle moving at high speed would be an unreasonable use of force violating the Fourth Amendment rights of a victim harmed by the shooting if the use of the vehicle did not present an immediate threat of serious harm at the time the officer fired, or if the use of deadly force was not necessary to prevent escape of a suspected felon, or if it were feasible for officers to warn of their intention to use deadly force before firing). On the other hand, courts have recognized that "it is constitutionally permissible for an officer to use deadly force when 'the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.'" *Carr v. Tatangelo*, 338 F.3d 1259, 1268 (11th Cir. 2003) (quoting *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S. Ct. 1694, 1701, 85 L. Ed. 2d 1 (1985)) (other citations omitted). If Officers Frye and Stone were acting in self defense, in an attempt to avoid the harm of a driver intent on running over them with his vehicle, the force used was not unreasonable and did not violate [*9] Jones's constitutional rights. *See Pace v. Capobianco*, 283 F.3d 1275, 1282 (11th Cir. 2002) (shooting victim had used an automobile so as to give reasonable policemen probable cause to believe that it had become a deadly weapon with which he was armed).

Therefore, a genuine issue of material fact exists as to whether the officers violated Jones's Fourth Amendment

rights. Because there is a factual dispute as to whether the officers acted in self defense, summary judgment on the Fourth Amendment claim was improper.

B. Qualified Immunity

Ordinarily, "[q]ualified immunity offers 'complete protection for government officials sued in their individual capacities as long as their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known.' The purpose of this immunity is to allow government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation." *Lee*, 284 F.3d at 1194 (quoting *Thomas v. Roberts*, 261 F.3d 1160, 1170 (11th Cir. 2001)) (additional quotations omitted). However, "[i]n order to receive qualified immunity, the public official must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred. If the defendant was not acting within his discretionary authority, he is ineligible for the benefit of qualified immunity." *Id.* (internal quotations and citations omitted). "A government official acts within her discretionary authority if the actions were (1) undertaken pursuant to the performance of [her] duties and (2) within the scope of [her] authority." *Lenz v. Winburn*, 51 F.3d 1540, 1545 (11th Cir. 1995) (internal quotations omitted).

In this case, Officers Stone and Frye have not proven that they were acting within the scope of their discretionary authority when they interacted with Jones. The officers do not dispute that they were outside of their police jurisdiction when they allegedly violated Jones's constitutional rights. And, they have presented nothing to support a finding that their interaction with Jones was undertaken in performance of their official duties. While they suggest, in a footnote in their

appellate brief, that Georgia law authorizes police officers to arrest those committing crimes in their presence even if the crime is committed outside of the officers' police jurisdiction, Officers Stone and Frye did not contend in the district court nor on appeal that they were arresting Jones. Instead, they have maintained that they intended to render him aid. And, Dr. Richard Clark, the City of Atlanta Police Department's head of Planning and Research, testified that, in such circumstances, City of Atlanta police officers have only the same authority as an ordinary citizen when they are outside the territorial jurisdiction of the City of Atlanta. (R.2-36 at 50.) Thus, Officers Stone and Frye are not entitled to summary judgment grounded upon qualified immunity for their actions during the interaction with Jones. *See Lenz*, 51 F.3d at 1547 (holding that guardian ad litem who acted outside the scope of her authority was not entitled to qualified immunity).

C. City of Atlanta Liability

We have recognized that "[f]or liability purposes, a suit against a public official in his official capacity is considered a suit against the local governmental entity he represents." *Vineyard v. County of Murray, Ga.*, 990 F.2d 1207, 1210 n.3 (11th Cir. 1993). Therefore, the Joneses' claims against Officers Stone and Frye in their official capacities are claims against the City of Atlanta.

The district court held that the City of Atlanta could not be liable to the Joneses because no constitutional violation occurred. As stated above, the existence of a constitutional violation is a jury question. But, we affirm the district court's grant of summary judgment on the § 1983 claims against the City of Atlanta on another basis.

A local government is liable to a § 1983 plaintiff for actions of the government's agents when a constitutional injury was inflicted in execution of the government's policy or custom. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 2037, 56 L. Ed. 2d 611 (1978). Here, the Joneses assert that the City of Atlanta has informally adopted a policy condoning the use of deadly force (including firing of weapons at vehicles) in all situations, including those in which the use of weapons is clearly unlawful. Appellants' Opening Brief at 33. But the Joneses cite no record evidence in support of this assertion. Therefore, they cannot maintain their § 1983 claims against the City of Atlanta. The City of Atlanta was due summary judgment.

D. State Law Claims

The district court declined to exercise jurisdiction over the Joneses' state law claims because it had disposed of all the claims over which it had original jurisdiction on summary judgment. *See* 28 U.S.C. § 1367(c). Because we reverse the grant of summary judgment as to the § 1983 claims against Officers Stone and Frye in their individual capacities, we also vacate dismissal of the state law claims and instruct the district court to reconsider the question of whether to exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over the Joneses' state law claims.

AFFIRMED IN PART; REVERSED IN PART; VACATED IN PART; AND REMANDED.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE
NO. 1:04-cv-1928-CC

[Filed March 30, 2006]

ESTATE OF ALLISON JONES and TABITHA JONES, ALLISON JONES, JR., CAMARIO COLLINS JONES, ALOJUWAN JONES and KHALIQ ALEXANDER JONES, Plaintiff,	)
v.	)
THE CITY OF ATLANTA, OFFICER MARILYN T. STONE, OFFICER CHARLES E. FRYE, Defendant.	)

JUDGMENT

This action having come before the court, Honorable Clarence Cooper, United States District Judge, for

consideration of defendants' motion for summary judgment, and the court having granted said motion, it is

Ordered and Adjudged that the plaintiff take nothing; that the defendants' recover its costs of this action, and the action be, and the same hereby, is **dismissed**.

Dated at Atlanta, Georgia, this 30th day of March, 2006.

LUTHER D. THOMAS
CLERK OF COURT

By: *s/Velma Shanks*
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
March 30, 2006
Luther D. Thomas
Clerk of Court

By: *s/Velma Shanks*
Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO.
1:04-cv-1928-CC

[Filed March 29, 2006]

ESTATE OF ALLISON JONES	)
and TABITHA JONES, in her capacity	)
as the wife of ALLISON JONES,	)
deceased, and as representative of his	)
children ALLISON JONES, JR.,	)
CAMARIO COLLINS JONES,	)
ALOJUWAN JONES and	)
KHALIQ ALEXANDER JONES,	)
Plaintiffs,	)
v.	)
THE CITY OF ATLANTA,	)
OFFICER MARILYN T. STONE,	)
in her individual capacity and official	)
capacity as an Officer of the Atlanta	)
Bureau of Police Services, and	)
OFFICER CHARLES E. FRYE,	)
in his individual capacity and official	)
capacity as an officer in the Atlanta	)
Bureau of Police Services	)
Defendants.	)
	)

ORDER

Pending before the Court in this 42 U.S.C. § 1983 civil rights action are the Defendants' Motion for Summary Judgment [24] the Defendants' Motion for Leave to File Excess Pages [25] and the Plaintiffs' Motion for Leave to File Excess Pages [29].

I. BACKGROUND

A. THE PARTIES

Plaintiff Tabitha Jones ("Jones") is bringing this action on behalf of the estate of Allison Jones, her deceased husband. Mrs. Jones is also representing Allison Jones' children, Allison Jones, Jr., Camario Jones, Zecosha Jones, Alojuwan Jones, and Khaliq Jones. The Defendants ("Defendants") are the City of Atlanta, Marilyn Stone ("Stone") in her individual capacity and official capacity as a City of Atlanta police officer, and Charles E. Frye ("Frye") in his individual capacity and official capacity as a City of Atlanta police officer.

B. THE FACTS

Stone and Frye shot and killed Allison Jones in July of 2002 at the site of an automobile collision in which Jones was the sole driver. On the day in question, Stone and Frye were in their patrol car stopped at a traffic light at the intersection of Harrison Road and Virginia Avenue in East Point, Georgia. The officers observed Jones in a white Lincoln Navigator driving eastbound in the westbound lane at a high rate of speed. The Navigator passed the patrol car and attempted to turn onto the I-85 expressway entrance. While making the turn, Jones lost control of his car and crashed

through the I-85 guard rail. Stone drove the short distance to the crash with the patrol car's siren and blue police lights on. She parked the marked police car at a 45-degree angle from the right rear corner of the Navigator.

According to eye-witnesses the entire incident happened very quickly. The two officers approached the Navigator. Officer Stone stood in cautious stance with her gun drawn. She knocked on the driver's side window and shouted for Jones to exit the car. Frye stood at the Navigator's rear. Witnesses stated that Stone rapped on the driver's window several times. Frye also commanded the driver to exit the car. When Jones did not exit, Stone moved toward the driver's side rear door. Three or more eye-witnesses testified that Jones was momentarily unconscious from the impact of the crash, although dark tint on the Navigator windows concealed the Navigator's interior. Stone was behind the car and Frye was about to open the driver's door when Jones started the car, shifted into reverse, and accelerated toward the officers. Eye witnesses stated that Jones appeared to be trying to run over Stone and Frye. Stone pivoted away from the rear of the car and fired, thinking that she had heard shots. Jones did not have a weapon, but the officers were unable to see him through the Navigator's darkly tinted windows. Jumping away from the Navigator's path, Frye also fired. The car took off eastbound on Virginia Avenue. The officers' shots were fired at the side and back of the Navigator as the car turned down Virginia Avenue. Stone and Frye returned to their patrol car and followed Jones down Virginia Avenue. The Navigator traveled a short distance and crashed into a large display sign and another parked car. As the officers walked up to the Navigator they saw Jones sitting up but slumped over and radioed for an ambulance. The Fulton County Medical Examiner's Report indicated there was a penetrating/perforating gunshot wound to the chest and the

right wrist. The Georgia Bureau of Investigation's laboratory determined that the fatal shot to the chest came from Officer Frye's weapon. The injury to the right wrist was inflicted by Officer Stone.

The G.B.I.'s toxicology report indicated that Jones tested positive for alcohol and cocaine. In his system was: cocaine 1.5 mg/L (=/-22); coca ethylene, 30 micrograms/lite (=/-22%); Benzolyecgonine (a metabolite of cocaine), .8 mg/L 9=/-22%); alcohol, .028 gms per 100/ml. The GBI recovered a partial "crack" pipe from the driver's floorboard and the front console, along with the type of pink colored bag commonly used for crack cocaine. The agent also recovered a 22 ounce beer bottle, a 16-ounce malt liquor can, and other alcohol paraphernalia from the Navigator. Jones had a previous conviction for a narcotics violation but there were no warrants for his arrest or active police calls regarding him at the time. Both Stone and Frye were veteran officers assigned to the Hartsfield-Jackson International Airport in Atlanta. Stone had worked at the airport for 15 of her 31 years of service.

II. DISCUSSION

A. SUMMARY JUDGMENT STANDARD

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P 56(c). While the movant carries the initial burden of showing the absence of a genuine issue as to any material fact, the movant is not required to negate his opponent's claim, but rather, may discharge his burden merely by " 'showing' –

that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). When this burden is met, the non-movant is then required "to go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324, 106 S.Ct. at 2553 (quoting Fed.R.Civ.P. 56(e)).

A court evaluating a summary judgment motion must view the evidence in the light most favorable to the non-movant. *Samples v. City of Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988); *Tippens v. Celotex Corp.*, 805 F.2d 949, 953 (11th Cir. 1986), *reh'g denied*, 815 F.2d 66 (11th Cir. 1987). However, Rule 56 "[b]y its very terms, . . . provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-8, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986) (emphasis in original); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986) (non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts"). The non-moving party must come forward with specific facts showing that there is a genuine issue for trial. *Matsushita*, 475 U.S. at 587. An issue is not genuine if it is created by evidence that is "merely colorable" or is "not significantly probative." *Anderson*, 477 U.S. at 249-50, 106 S.Ct. at 2511; *accord Young v. General Foods Corp.*, 840 F.2d 825, 828 (11th Cir. 1988). Substantive law will identify which facts are material. *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510. Thus, to survive a motion for summary judgment, the non-moving

party must come forward with specific evidence of every element essential to his case, so as to create a genuine issue for trial. *See Celotex*, 477 U.S. at 323, 106 S.Ct. at 2553.

B. EXCESSIVE FORCE IN VIOLATION OF THE FOURTH AMENDMENT

The Plaintiffs are suing Stone and Frye in their individual capacities, alleging the use of excessive force in Jones' death. The doctrine of qualified immunity protects police officers from being sued in their individual capacities unless the law existing when the supposedly wrongful act occurred was already established to such a high degree that every objectively reasonable police officer standing in the defendant officer's place would be on notice that what the defendant officer was doing was clearly unlawful under the circumstances. *Pace v. Capobianco*, 283 F.3d 1275, 1282 (11th Cir. 2002) *See Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). On the other hand, when an officer's actions are so "objectively reasonable" that another objectively reasonable officer in the same place could have believed that the defendant officer's action was lawful, qualified immunity applies. *Anderson v. Creighton*, 483 U.S. 635, 638-41, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). Qualified immunity permits government officials to carry out their discretionary duties without worrying about personal liability or harassing litigation. *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002)(internal quotation marks and citations omitted). Additionally, qualified immunity protects from suit all but plainly incompetent individuals or individuals who knowingly violate federal law. *Vineyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002); *Pace v. Capobianco*, 283 F.3d 1275 (11th Cir. 2002).

When an excessive force claim arises in the context of an investigative stop or arrest, it is most properly characterized, and the Court will analyze it as a claim invoking Fourth Amendment protections. *Graham v. Connor*, 109 S.Ct. 1865, 490 U.S. 386, 109 S.Ct. 1865 (1989).[1] There is a two-step analysis involved in determining whether qualified immunity applies to an officer's conduct when a plaintiff claims the use of excessive force. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001). "The first step is to determine whether the facts '[t]aken in the light most favorable to the party asserting the injury, . . . show the officer's conduct violated a constitutional right[.]'" *Robinson v. Arrugueta*, 415 F.3d 1252, 1255 (11th Cir. 2005) (quoting *Saucier*, at 201, 121 S.Ct. at 2156). "If the conduct did not violate a constitutional right, the inquiry ends there. If the conduct violated a constitutional right, a court must move on to the second step and determine 'whether the right was clearly established.'" *Robinson*, at 1255 (quoting *Saucier*, at 201,121 S.Ct. at 2156).

To determine whether Stone and Frye's conduct violated the Fourth Amendment the Court must examine the officers' conduct under "objective standards of reasonableness". *Graham*, 490 U.S. at 396-97, 109 S.Ct. at 1872. "The right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Vineyard v. Wilson*, 311 F.3d 1340, 1347 (11th Cir. 2002) (citing *Terry v. Ohio*, 392 U.S. 1, 22-27, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). Additionally,

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[1] The Complaint alleges violations of the Fifth, Eighth, and Fourteenth Amendments, however claims for the excessive use of force are properly characterized as invoking Fourth Amendment protections. Additionally, Plaintiffs have not pursued their other constitutional claims.

use of deadly force is considered reasonable under the Fourth Amendment when an officer "(1) 'has probable cause to believe that the suspect poses a threat of serious physical harm either to the officer or to others' or 'that he has committed a crime involving the infliction or threatened infliction of serious physical harm;' (2) reasonably believes that the use of deadly force was necessary to prevent escape; and (3) has given some warning about the possible use of deadly force, if feasible." *Vaughan v. Cox*, 343 F.3d 1323, 1329-30 (11th Cir. 2003) (quoting *Tennessee v. Garner*, 471 U.S.1, 11-12, 105 S.Ct. 1694, 1701, 85 L.Ed.2d 1 (1985)).

In *Robinson v. Arrugueta*, a 2005 case, the Eleventh Circuit Court of Appeals held that qualified immunity barred suit against a police officer who shot a drug trafficking suspect in a car. The officer, Arrugueta, was standing in a small space between the suspect's car and the car in front of it. The suspect defied Arrugueta's order to raise his hands and began slowly moving his car forward toward Arrugueta. Although he conceivably had time to jump out of the way, Arrugueta shot the suspect. In affirming the district court's finding of qualified immunity, the Eleventh Circuit stated:

> Though the facts must be taken in the light most favorable to Robinson, the determination of reasonableness must be made from the perspective of the officer. The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation."

* * *

> Our precedent instructs us to take into account that [r]econsideration [after the uncertainty and the excitement of the moment have passed] will nearly always reveal that something different could have been done if . . . the future [was known] before it occurred. Even if in hindsight the facts show that Arrugueta perhaps could have escaped unharmed, we conclude that a reasonable officer could have perceived that Walters was using the Escort as a deadly weapon. Arrugueta had probable cause to believe that Walters posed a threat of serious physical harm. (Citations and quotation marks omitted.)

Robinson, at 1256.

In *Pace v. Capobianco*, 283 F.3d 1275 (11th Cir. 2002), a suspect led police on a wild 15 minute chase that eventually stopped in a dead-end street. Police blocked the suspect in on three sides and the suspect remained in his car with the engine running. Deputies yelled at the suspect to get out of the car. Within a very few seconds an officer fired two shots at the suspect though the front windshield. As the car moved forward officers fired again, killing the suspect. The suspect had not aimed his car at the officers or tried to run over them. Noting that the suspect had "left the street and driven through residential yards" earlier, the court stated that the officers could not tell if the chase was actually over. In light of the suspect's prior hazardous driving, the *Pace* court held that the suspect had used his "automobile in a manner to give reasonable policemen probable cause to believe that it had become a deadly weapon with which [the suspect]was armed and that use of deadly force in that situation did not violate Fourth Amendment standards.

In Georgia, a law enforcement officer is justified in using deadly force when that officer (1) "reasonably believes that the suspect possesses a deadly weapon"; (2) "reasonably believes that the suspect poses an immediate threat of physical violence to the officer or others;" or (3) "when there is probable cause to believe that the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm." O.C.G.A. § 17-4-20. Also, in Georgia, a car driven in a threatening manner can be considered a deadly weapon. *Robinson*, 415 F.3d at 1256 (citing *Webb v. State*, 256 Ga.Ap. 653, 654, 569 S.E.2d 596, 597 (2002))("[O]ne who aims a motor vehicle at another person may be convicted of aggravated assault regardless of whether the victim sustained any injuries or was even touched by the vehicle."). *See Pace v. Capobianco*, 283 F.3d 1275 (2002).

Viewing the facts in this case from the perspective of the officers, at the time of the incident,[2] we have a scene in which Stone and Frye were standing within inches of the Navigator. Frye was reaching for the car door and Stone was standing to the rear. The car windows were darkly tinted so the officers could not see Jones but Jones could see them. The officers' guns were drawn and they were commanding Jones to get out of the car. Without warning, and according to eye-witnesses, Jones backed the car toward the officers as if he was trying to kill them. Given that fact that the entire incident happened very quickly, and without pause, a reasonable officer could

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[2] Because the Court's analysis focuses on Stone and Frye's knowledge at the time of the incident, the Court is not taking into account that a subsequent analysis of Jones' system showed high levels of alcohol and cocaine.

have viewed Jones as using his car as a deadly weapon. This is especially true given that Jones appeared to be defying the officers' orders to exit the car. In these circumstances, Stone and Frye had probable cause to believe that Jones posed a threat of serious physical harm. "Because it is constitutionally reasonable for an officer to use deadly force when a suspect is threatening escape and possible harm to others, it is also constitutionally reasonable for an officer to use deadly force when he has probable cause to believe that his own life is in peril." *Robinson*, 415 F.3d 1256. Accordingly, Stone and Frye did not violate Jones' Fourth Amendment rights and are shielded from suit by qualified immunity.

If Stone and Frye's use of deadly force in this situation had, in fact, violated the Fourth Amendment, the officers would still be entitled to qualified immunity under the second step of the *Saucier* analysis. "Qualified immunity shields an officer from suit when she makes a decision that even if constitutionally deficient reasonably misapprehends the law governing the circumstances she confronted." *Robinson*, at 1256 (citing *Brosseau v. Haugen*, 543 U.S. 194,199, 125 S.Ct. 596, 599, 160 L.Ed.2d 583 (2004)). The Plaintiffs contend that since the officers did not begin shooting until they were out from behind the Navigator and Jones did not possess a firearm, that Stone and Frye shot when they were not in danger. When a suspect poses no immediate threat to the officer and no threat to others, an officer is not entitled to use deadly force. *Robinson*, at 1256. The Court does not agree that Jones posed no threat. Jones' actions in backing the car toward armed officers in contravention of their direct orders combined with his dangerous driving posed a deadly threat. The Court has not found a case that prohibits police officers from using deadly force in a situation such as this.

Stone and Frye would be entitled to qualified immunity

had they violated the Fourth Amendment under a misunderstanding of the law.

C. CITY LIABILITY

The Complaint names Stone and Frye as defendants in their official capacities as City of Atlanta police officers. However, a plaintiff's suit against an individual defendant in his official capacity is synonymous with a suit against the City of Atlanta. *Hafer v. Melo*, 502 U.S. 21, 25, 112 S.Ct. 358, 361, 116 L.Ed.2d 301 (1991). Specifically, "[f]or liability purposes, a suit against a public official in his official capacity is considered a suit against the local governmental entity he represents." *Vineyard v. County of Murray, Ga.*, 990 F.2d 1207, 1210 n.3 (11th Cir. 1993). Accordingly, Plaintiffs' action against Stone and Frye in their official capacities is tantamount to its action against the City of Atlanta.

Case law does not permit the award of damages against a municipal corporation based on the actions of one of its officers when the officer inflicted no constitutional harm. *City of Los Angeles v. Heller*, 106 S.Ct. 1571, 1573, 475 U.S. 800 (1986). Only when it is clear that violation of specific constitutional rights has occurred can a question of 1983 municipal liability for injury arise. *Vineyard v. Murray*, 990 F.2d 1207 (11th Cir. 1993). Therefore, Plaintiffs' claims against Stone and Frye in their official capacities and against the City of Atlanta are not viable in this matter.

III.CONCLUSION

For the reasons set forth in the above Discussion, the Court GRANTS Defendants' Motion for Summary Judgment [24].[3] The Court further GRANTS the Plaintiffs and Defendants motions for leave to file excess pages [25 and 29].

SO ORDERED this 29th day of March, 2006.

s/ CLARENCE COOPER
CLARENCE COOPER
UNITED STATES DISTRICT JUDGE

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[3] Pursuant to 28 U.S.C. § 1367(c), the Court declines to exercise supplemental jurisdiction over Plaintiffs' pendant state claims for the reason that the Court is granting summary judgment in favor of the Defendants as to all claims over which the Court has original jurisdiction.

APPENDIX E

STATUTORY PROVISION INVOLVED

OFFICIAL CODE OF GEORGIA
TITLE 17. CRIMINAL PROCEDURE
CHAPTER 4. ARREST OF PERSONS
ARTICLE 2. ARREST BY LAW ENFORCEMENT OFFICERS GENERALLY

O.C.G.A. § 17-4-20

§ 17-4-20. Authorization of arrests with and without warrants generally; use of deadly force; adoption or promulgation of conflicting regulations, policies, ordinances, and resolutions; authority of nuclear power facility security officer

(a) An arrest for a crime may be made by a law enforcement officer either under a warrant or without a warrant if the offense is committed in such officer's presence or within such officer's immediate knowledge; if the offender is endeavoring to escape; if the officer has probable cause to believe that an act of family violence, as defined in Code Section 19-13-1, has been committed; if the officer has probable cause to believe that an offense involving physical abuse has been committed against a vulnerable adult, who shall be for the purposes of this subsection a person 18 years old or older who is unable to protect himself or herself from physical or mental abuse because of a physical or mental impairment; or for other cause if there is likely to be failure of justice for want of a judicial officer to issue a warrant.

(b) Sheriffs and peace officers who are appointed or employed in conformity with Chapter 8 of Title 35 may use deadly force to apprehend a suspected felon only when the officer reasonably believes that the suspect possesses a deadly weapon or any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury; when the officer reasonably believes that the suspect poses an immediate threat of physical violence to the officer or others; or when there is probable cause to believe that the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm. Nothing in this Code section shall be construed so as to restrict such sheriffs or peace officers from the use of such reasonable nondeadly force as may be necessary to apprehend and arrest a suspected felon or misdemeanant.

(c) Nothing in this Code section shall be construed so as to restrict the use of deadly force by employees of state and county correctional institutions, jails, and other places of lawful confinement or by peace officers of any agency in the State of Georgia when reasonably necessary to prevent escapes or apprehend escapees from such institutions.

(d) No law enforcement agency of this state or of any political subdivision of this state shall adopt or promulgate any rule, regulation, or policy which prohibits a peace officer from using that degree of force to apprehend a suspected felon which is allowed by the statutory and case law of this state.

(e) Each peace officer shall be provided with a copy of this Code section. Training regarding elder abuse, abuse of vulnerable adults, and the requirements of this Code section should be offered as part of at least one in-service training

program each year conducted by or on behalf of each law enforcement department and agency in this state.

(f) A nuclear power facility security officer, including a contract security officer, employed by a federally licensed nuclear power facility or licensee thereof for the purpose of securing that facility shall have the authority to:

(1) Threaten or use force against another in defense of a federally licensed nuclear power facility and the persons therein as provided for under Code Sections 16-3-21 and 16-3-23;

(2) Search any person on the premises of the nuclear power facility or the properties adjacent to the facility if the facility is under imminent threat or danger pursuant to a written agreement entered into with the local enforcement agency having jurisdiction over the facility for the purpose of determining if such person possesses unauthorized weapons, explosives, or other similarly prohibited material; provided, however, that if such person objects to any search, he or she shall be detained as provided in paragraph (3) of this subsection or shall be required to immediately vacate the premises. Any person refusing to submit to a search and refusing to vacate the premises of a facility upon the request of a security officer as provided for in this Code section shall be guilty of a misdemeanor; and

(3) In accordance with a nuclear security plan approved by the United States Nuclear Regulatory Commission or other federal agency authorized to regulate nuclear facility security, detain any person located on the premises of a nuclear power facility or on the properties adjacent thereto if the facility is under imminent threat or danger pursuant to a written agreement entered into with the

local law enforcement agency having jurisdiction over the facility, where there is reasonable suspicion to believe that such person poses a threat to the security of the nuclear power facility, regardless of whether such prohibited act occurred in the officer's presence. In the event of such detention, the law enforcement agency having jurisdiction over the facility shall be immediately contacted. The detention shall not exceed the amount of time reasonably necessary to allow for law enforcement officers to arrive at the facility.